Supreme Court, U.S.
FILED
00 334 AUG 28 2000
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

SOO LINE RAILROAD COMPANY,

Petitioner,

v.

RICHARD WALKER,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

MICHAEL P. CONNELLY
Counsel of Record
THOMAS F. TOBIN
MATTHEW P. CONNELLY
CONNELLY ROBERTS & McGIVNEY LLC
One North Franklin Street
Suite 1200
Chicago, Illinois 60606
(312) 251-9600
Attorneys for Petitioner

Midwest Law Printing Company/Photex — Chicago — (312) 321-0220

92PD

QUESTION PRESENTED

Whether the Court of Appeals misapplied the abuse of discretion standard as set forth in *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), in its review of the District Court's decision to exclude or limit expert testimony pursuant to Federal Rule of Evidence 702 and the considerations promulgated by *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

PARTIES TO THE PROCEEDING

The parties to the proceeding below were the petitioner, Soo Line Railroad Company, which was the defendant in the District Court and the respondent, Richard Walker, who was the original plaintiff in the District Court.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

PARTIES TO PROCEEDING ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 4

I. THE DECISION BELOW IS IN CONFLICT WITH THIS COURT'S HOLDINGS IN *DAUBERT v. MERRELL DOW PHARM.*, AND *GENERAL ELECTRIC v. JOINER* REGARDING THE ADMISSIBILITY OF EXPERT TESTIMONY 4

A. The Seventh Circuit's Decisions Regarding The Admissibility Of Expert Testimony Demonstrate Its Failure to Appropriately Review These Rulings Under The Abuse Of Discretion Standard Set Forth In *General Electric v. Joiner* and *Kumho Tire v. Carmichael* 5

B. The Seventh Circuit's Determinations With Regard To The Admissibility Of Expert Testimony Conflict With The Principles, Standards And Objectives Set Forth In *Daubert v. Merrell Dow Pharm.* 9

1. Under the *Daubert* Standard, Dr. Pliskin's Testimony Regarding Pre-Injury I.Q. Should Have Been Excluded As Unreliable And Because It Would Not Assist The Trier Of Fact 11

2. Under The *Daubert* Standard, The Testimony Of Dr. Capelli-Schellpfeffer Should Have Been Excluded Because Her Testimony Was Inherently Unreliable 18

3. Under The *Daubert* Standard, The Testimony Of Dr. Uman Should Have Been Excluded Because His Opinions Relating To Causation Were Unreliable 23

CONCLUSION 27

APPENDIX

APP. PAGE

Walker v. Soo Line Railroad Co., 208 F.3d 581 (7th Cir. 2000) 1

Walker v. Soo Line Railroad Co., No. 98-4237 (7th Cir. May 31, 2000) (Order–Rehearing Denied) 19

Walker v. Soo Line Railroad Co., No. 93 C 3861 (N.D. Ill. 1998) (Order–Motions in Limine granted in part and denied in part) 20

Walker v. Soo Line Railroad Co., 93 CV 3861 (N.D. Ill. 1998) (Hearing On Motions (Continued) Before The Honorable Magistrate Judge Arlander Keys) 21

Walker v. Soo Line Railroad Co., 93 C 3861 (N.D. Ill. 1998) (Judgment In A Civil Case) 54

TABLE OF AUTHORITIES

Cases PAGE(S)

Allapattah Services, Inc. v. Exxon Corp.,
61 F. Supp. at 1341 21

Barrett v. International Armaments, Inc.,
999 WL 199253 (N.D. Ill. 1999) 13, 25

Bauer v. J.B. Hunt Transport,
150 F.3d 759 (7th Cir. 1998) 24

Birdsell v. United States,
346 F.2d 775 (5th Cir. 1965) 19

Black v. Food Lion, Inc.,
171 F.3d 308 (5th Cir. 1999) 13

Cole v. Control Data Corp.,
947 F.2d 313 (8th Cir. 1991) 25

Cooper v. Carl A. Nelson & Co.,
211 F.3d 1008 (7th Cir. 2000) 11, 12

Daubert v. Merrell Dow Pharmaceuticals,
509 U.S. 579 (1993) 3, 4, 5, 8, 9, 10, 11, 12,
. . . . . 13, 16, 17, 18, 19, 22, 26

DePaepe v. GM Corp.,
141 F.3d 715 (7th Cir. 1998) 25

Driggs v. Sofamor,
44 F. Supp. 2d 760 (M.D.N.C. 1998) 25

Dukes v. Illinois Central Railroad Co.,
934 F. Supp. 939 (N.D. Ill. 1996) 13

Durflinger v. Artiles,
727 F.2d 888 (10th Cir. 1984) 19

General Electric v. Joiner,
522 U.S. 136 (1997) 4, 5, 6, 8, 17, 18

Jackson v. Bunge Corp.,
40 F.3d 239 (7th Cir. 1994) 7

John Morrell & Co. v. Local Union 304A,
913 F.2d 544 (8th Cir. 1990) 25

Jones v. Royalton Food Service Equipment Co.,
1998 WL 792184 (N.D. Ind. 1998) 21

Kumho Tire v. Carmichael,
526 U.S. 137 (1999) 4, 5, 6, 8, 17, 18

Ladien v. Astrachan,
128 F.3d 1051 (7th Cir. 1997) 7

Lawson v. Smith,
1999 WL 1129677 (N.D. Ga. 1999) 25

Menges v. Depu Motech, Inc.,
61 F. Supp. 2d 817 (N.D. Ind. 1999) 25

Rosen v. CIBA-Geigy Corp.,
78 F.3d 316 (7th Cir. 1996) 25

Stasior v. Nat. Railroad Passenger Corp.,
19 F. Supp. 2d 835 (N.D. Ill. 1998) 19

United States v. Cheska,
202 F.3d 947 (7th Cir. 2000) 6

United States v. Hankey,
203 F.3d 1160 (9th Cir. 2000) 6

United States v. Saya,
961 F. Supp. 1395 (Haw. 1996) 9

Zarecki v. National Railroad Passenger Corp.,
914 F. Supp. 1566 (N.D. Ill. 1996) 25

Statutes

Federal Employer's Liability Act,
45 U.S.C. §51, *et seq.* 2

Federal Rule of Evidence 702 . . . . . 2, 12

PETITION FOR WRIT OF CERTIORARI

Soo Line Railroad Company ("Soo Line") respectfully petitions that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on March 31, 2000.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 208 F.3d 581 (7th Cir. 2000) and is reprinted in the Appendix hereto at page App. 1. The order entered by the Court of Appeals denying Soo Line's petition for rehearing is reprinted in the Appendix at page App. 19. The order of the United States District Court for the Northern District of Illinois regarding the Motions in Limine is unreported, but is reprinted in the Appendix at App. 20. In addition, the oral rulings of Magistrate Judge Keys regarding the motions in limine at issue are reprinted in the Appendix at App. 21. The judgment entered by the United States District Court for the Northern District of Illinois is reprinted in the Appendix at App. 54.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on March 31, 2000. A timely Petition for Rehearing was denied on May 31, 2000. (App. 19) The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

Federal Rule of Evidence 702. Testimony by Experts

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise.

STATEMENT OF THE CASE

The respondent, Richard Walker, filed a lawsuit against the Soo Line seeking damages under the Federal Employer's Liability Act, 45 U.S.C. §51, *et seq.*, for injuries that he allegedly sustained while working as a tower operator at the Bensenville train yard. As a tower operator, Walker was responsible for directing railroad cars to certain tracks by operating switches from within the control tower.

On October 25, 1991 at approximately 3:00 a.m., Walker claims that he received injuries from a lightning bolt while he was near his control board. On June 23, 1993, Walker filed his complaint against the Soo Line claiming loss of hearing resulting from the alleged electrical injury. Walker later amended his Complaint to allege that he sustained psychiatric and psychological injuries as a result of the lightning strike instead of the loss of hearing that he earlier claimed. Walker testified that in December 1996, over five years after the occurrence, his lawyers referred him to the Electrical Trauma Research Program at the University of Chicago for the purpose of engaging an expert for trial. Researchers at this program conducted studies on the effects of electrical injuries through facilities provided by

the university and funding provided by utility companies. This funding was later discontinued and the university withdrew its support for the program.

Trial of this matter was set for November 16, 1998 in the District Court for the Northern District of Illinois, Magistrate Judge Arlander Keys presiding. On October 23, 1998, the parties filed their Motions in Limine. The relevant motions filed by Soo Line sought to bar the testimony of Walker's experts, Dr. Neil Pliskin, Dr. Mary Capelli-Schellpfeffer and Dr. Martin Uman based upon the standards set forth in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). After hearing argument on the motions and stating that he had read all materials several times, including the motions and depositions, the District Court granted Soo Line's motion to bar Dr. Capelli-Schellpfeffer and Dr. Uman from testifying at trial and limited the testimony of Dr. Pliskin. (App. 22-23, 31-32, 46-47, 52) Ultimately, the jury entered a verdict in favor of Soo Line and against Walker. (App. 54)

Walker appealed the judgment entered by the District Court. Walker's appeal was premised upon alleged errors made by the District Court with regard to its evidentiary rulings on the parties' Motions in Limine. Specifically, Walker claimed that the District Court had erred in excluding or limiting the testimony of his expert witnesses, Dr. Pliskin, Dr. Capelli-Schellpfeffer and Dr. Uman. In addition, he claimed that it was error to admit the testimony of Frank Denbrock and Dr. Upton as well as his prior mental health records. On September 16, 1999, the Seventh Circuit Court of Appeals, Judges Ripple, Manion and Diane. P. Wood, heard oral argument and, on March 31, 2000, the Seventh Circuit reversed the jury verdict and remanded the case to the District Court. *Id.* at 581. (App. 18) In purported reli-

ance on *General Electric v. Joiner*, 522 U.S. 136 (1997), *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993), and the Federal Rules of Evidence, the Seventh Circuit found that the District Court had abused its discretion by excluding the expert testimony of Dr. Capelli-Schellpfeffer and Dr. Uman and limiting the expert testimony of Dr. Pliskin. *Id.* at 587-590. (App. 5-14) On May 30, 2000, the Seventh Circuit denied Soo Line's Petition for Rehearing. (App. 19) This Petition then followed.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW IS IN CONFLICT WITH THIS COURT'S HOLDINGS IN *DAUBERT v. MERRELL DOW PHARM.*, AND *GENERAL ELECTRIC v. JOINER* REGARDING THE ADMISSIBILITY OF EXPERT TESTIMONY.

Through *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993), and its progeny, *General Electric v. Joiner*, 522 U.S. 579 (1997), and *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999), this Court sought to resolve the confusion relating to the admissibility of expert testimony. The Seventh Circuit's decision in the case at bar, however, demonstrates that judges continue to miscontrue the principles set forth in *Daubert, supra,* as well as the reviewing court's role with respect to *Daubert* rulings. Due to the persistent misunderstanding and misapplication of *Daubert* and its progeny, this Court must review Soo Line's petition in order to prevent further inconsistency and align the Seventh Circuit which willfully refuses to abide by the principles and standards set forth by this Court with regard to the admissibility of expert testimony.

A. The Seventh Circuit's Decisions Regarding The Admissibility Of Expert Testimony Demonstrate Its Failure to Appropriately Review These Rulings Under The Abuse Of Discretion Standard Set Forth In *General Electric v. Joiner* and *Kumho Tire v. Carmichael.*

In its opinion, the Seventh Circuit correctly noted that the appropriate standard of review of a district court's evidentiary ruling is the abuse of discretion standard. *Walker,* 208 F.3d at 586 (App. 4); *see also General Electric*, 522 U.S. at 142; *Kumho Tire*, 526 U.S. at 152. Although the proper standard of review was identified by the Court, the Seventh Circuit's analysis and ultimate decision indicate that it usurped the gatekeeping role of the District Court described in *Daubert*, *supra*, and misapplied the abuse of discretion standard set forth in *General Electric v. Joiner*, *supra*, and *Kumho Tire v. Carmichael* in its review of the District Court's decision and reversal of its findings. If the Seventh Circuit had applied the abuse of discretion standard in accordance with *General Electric* and *Kumho Tire*, it would have upheld the District Court's rulings. As the Seventh Circuit refuses to comply with the Supreme Court's directives regarding the admission of expert testimony, including the reviewing court's role with regard thereto, this Court must review the Seventh Circuit's decision to ensure further compliance with the objectives of *Daubert*.

In *General Electric Co. v. Joiner*, the U.S. Supreme Court clearly set forth that a reviewing court is to apply the abuse of discretion standard when reviewing a district court's reliability determination regarding expert testimony. *Id.* at 142. In *Kumho Tire*, this Court found that "the law grants a district court the same broad latitude when it decides how to determine reliability as it enjoys in respect to its ultimate reliabil-

ity determination." *Id.* at 142. If the district court is not afforded wide latitude in its determination, it "would lack the discretionary authority needed both to avoid unnecessary 'reliability' proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises." *Id.* at 152. In *Kumho Tire*, this Court found that the district court had "considerable leeway" in determining whether the particular testimony of an expert is reliable. *Id.* at 152.

The panel of judges reviewing the case at bar apparently adopted its own "definition" of the abuse of discretion standard rather than applying it in accordance with the mandates of the Supreme Court or the applications of other Circuits. The Seventh Circuit previously appeared to comply with *Daubert*, however, recent decisions, including the decision of the panel in the case at bar, indicate that the Seventh Circuit is diverging from the other federal courts with respect to the issues addressed in *Daubert*. Several courts have found that courts of appeal should not reverse under an abuse of discretion standard unless the ruling is "manifestly erroneous." *See General Electric*, 552 U.S. at 142; *see also, United States v. Hankey*, 203 F.3d 1160, 1167 (9th Cir. 2000) (*quoting Joiner*, 552 U.S. at 142). In *United States v. Cheska*, 202 F.3d 947, 950 (7th Cir. 2000), the Seventh Circuit stated the following regarding its application of the abuse of discretion standard:

> We are not here, of course, to reweigh the considerations of the district court, or to decide if we would have come out the other way. When reviewing the district court's ruling for abuse of discretion, we reverse *only if we have a "strong conviction of error."*

(Emphasis added.) In *Ladien v. Astrachan*, 128 F.3d 1051, 1056 (7th Cir. 1997), the Seventh Circuit found that it was *obligated to affirm a decision* under the abuse of discretion standard unless:

> it is clear that *no reasonable person* could concur in the trial court's assessment of the issue under consideration. The abuse of discretion standard means something more than our belief that we would have acted differently if placed in the circumstance confonting the district judge. *To disagree with the district court's decision and to find that the court abused its discretion are two different things*. The district court's decision must strike us as *fundamentally wrong* for an abuse of discretion to occur.

(Emphasis added.) Similarly, in *Jackson v. Bunge Corp.*, 40 F.3d 239, 246 (7th Cir. 1994), the court stated that the abuse of discretion standard places a heavy burden on the appellant because "the relevant inquiry is not how the reviewing judges would have ruled if they had been considering the case in the first place, but rather, whether *any reasonable person could agree* with the district court." (Emphasis added.)

As these definitions of the standard reveal, the review of the district court's decision regarding the admissibility of expert testimony is not merely a forum in which the Court of Appeals may simply disagree with the lower court's determination and impose its own personal beliefs. Rather, the reviewing court must defer to the findings of the district court in the absence of striking or fundamental error. Moreover, the Court of Appeals has an *affirmative obligation* to affirm the district court unless "no reasonable person could concur" with the district court's decision. As such, if even one reasonable person could agree with the district court, the decision should be affirmed. The standard is extremely deferen-

tial and affords the district court wide latitude in its decision-making capabilities.

Despite the seemingly impossible hurdle that an appellant must overcome to reverse the district court's determinations regarding the admissibility of expert testimony, the panel of judges reviewing this case purportedly applied the abuse of discretion standard and reversed the District Court's decision to exclude or limit the testimony of Walker's experts. This anomaly resulted from the reviewing panel's abuse of *its* discretion in its purported review of the District Court's findings. The reviewing court's opinion illustrates that it did not follow the abuse of discretion standard but instead used the appellate process as an opportunity to voice its disagreement with the discretion afforded the district court in the application of the *Daubert* standard. The U.S. Supreme Court has spoken, on multiple occasions, regarding the standards for admitting expert testimony. *See Daubert, supra*; *General Electric, supra*; *see also, Kumho Tire, supra*. Therefore, this matter is not open for interpretation by the individual circuits. The Seventh Circuit must follow the directives of the U.S. Supreme Court regardless of its opposition to the principles, objectives and standards of *Daubert*. Throughout its opinion, the Seventh Circuit fails to afford the requisite deference to the findings of the District Court and instead engages in its own reweighing of the considerations that faced the District Court. Furthermore, Section B, *infra*, establishes that not only could a reasonable person concur with the District Court's decision to exclude certain experts based on the unreliability of their testimony but that the District Court's decision was unquestionably correct under the *Daubert* standard.

B. The Seventh Circuit's Determinations With Regard To The Admissibility Of Expert Testimony Conflict With The Principles, Standards And Objectives Set Forth In *Daubert v. Merrell Dow Pharm.*

In *Daubert*, *supra*, this Court suggested four non-exhaustive factors to consider in determining whether an expert opinion is sufficiently helpful to the trier of fact and is grounded in scientific knowledge. These factors are (1) whether the theory or technique can be and has been tested; (2) whether the theory or technique has been subject to peer review and publication; (3) what is the known rate of error of a technique or theory when applied; (4) what standards exist to control the operation of the technique; and (4) whether the theory or technique has gained "general acceptance" in the scientific community. 509 U.S. at 592-94. The court must not only determine that the reasoning and methodology underlying the testimony is scientifically valid but also that the reasoning and methodology can properly be applied to the facts at issue in the case. *Id.* at 592-93. An expert must base his opinions on facts and data of a type reasonably relied upon by experts in the field. *Id.* at 595. "[B]ald assurances of validity" by an expert, however, will not suffice to satisfy the *Daubert* analysis. *United States v. Saya,* 961 F. Supp. 1395, 1397 (Haw. 1996) (*citing Daubert*, 43 F.3d 1311 (9th Cir. 1995)). Furthermore, even if an expert's testimony does satisfy the *Daubert* test, the court still can conclude that under Federal Rule of Evidence 403, its probative value is substantially outweighed by the danger of unfair prejudice and confusion and the possibility that it would mislead the jury. *Id.* at 1397.

More importantly, however, *Daubert* mandated that the district courts act as the "gatekeepers" who assume the responsibility for keeping "junk science" from the

jurors. *Id.* at 596-97. These gatekeepers must ensure that the expert testimony presented is not only relevant, but reliable. *Daubert* recognized the danger of presenting pseudoscience to a jury through the medium of expert testimony; according to this Court, "[e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it." *Id.* at 595. Moreover, *Daubert* recognized that by acting as gatekeeper, the trial judge will prevent the jury from hearing some insightful and innovative evidence yet according to this Court, "[t]hat nevertheless is the balance that is struck by the Rules of Evidence designed not for the exhaustive search for cosmic understanding but for the particularized resolution of legal disputes." *Id.* at 597. Although *Daubert* clearly sets forth the gatekeeping role of the district court and the importance of preventing the admission of junk science, the Seventh Circuit's decision illustrates either its misperception of or refusal to apply these principles.

In this case, the District Court properly discharged its duty as "gatekeeper" with respect to the admissibility of the testimony of Plaintiff's experts, Dr. Pliskin, Dr. Capelli-Schellpfeffer and Dr. Uman. The District Court reviewed the opinions and proffered testimony of these three experts in light of the factors set forth in *Daubert, supra*. After giving substantial consideration to all of these matters, the District Court, in its discretion, excluded the testimony of these experts finding that it was unreliable and that its admission would not assist the trier of fact. An examination of the aforementioned experts' opinions in light of the factors for reliability set forth in *Daubert* highlights the juxtaposition of the propriety of the District Court's ruling and the erroneous reasoning of the Seventh Circuit. Such analysis illustrates the Seventh Circuit's failure to comply with the directives of *Daubert*.

1. Under the *Daubert* Standard, Dr. Pliskin's Testimony Regarding Pre-Injury I.Q. Should Have Been Excluded As Unreliable And Because It Would Not Assist The Trier Of Fact.

The Seventh Circuit found that the District Court erred in excluding the testimony of Dr. Pliskin finding that: (1) Dr. Pliskin had employed a proper methodology; (2) he relied upon appropriate sources of information; and (3) his testimony would have assisted the jury with a fact at issue. 208 F.3d at 586-87. (App. 5-8) In reaching its conclusion, however, the Seventh Circuit disregarded Dr. Pliskin's inappropriate reliance on a falsified educational and mental history of Walker and Dr. Pliskin's inability to definitively opine on the issue for which his testimony was offered. Moreover, the Seventh Circuit's finding that these suspect issues would be appropriate for jury consideration completely ignores the theory and purpose behind the *Daubert* decision. It is imperative that uninformed, unreliable and irrelevant expert testimony not be presented to the jury due to the great potential for misuse, yet this Court's decision simply opens the Pandora's box which *Daubert* attempted to close.

As the basis for its decision to admit the testimony of Dr. Pliskin, the Seventh Circuit relied upon only one self-serving and somewhat inapplicable case, *Cooper v. Carl A. Nelson & Co.*, 211 F.3d 1008 (7th Cir. 2000). The Seventh Circuit, namely the exact same panel of judges, decided *Cooper* only twenty-four days before issuing the decision in the case at bar. Like the instant case, the plaintiff in *Cooper* had provided the expert with an inaccurate history upon which the expert relied in formulating his opinions. *Id.* at 1019-20. Because the erroneous medical history was the basis for the expert's diagnosis and conclusions, the district court excluded the expert's testimony as well as the testimony of other

physicians who had relied upon the inaccurate history as unreliable. *Id.* at 1020. In *Cooper*, the Seventh Circuit found that the testimony should have been admitted because the methodology of relying upon patient histories and examination which was employed by the expert was appropriate. *Id.* In addition, the Seventh Circuit found that the accuracy and truthfulness of the underlying history could be subjected to cross-examination and evaluation by the jury. *Id.* at 1021.

The differences between *Cooper*, *infra*, and the case at bar are striking. Clearly, the decision in *Cooper* appears cosmetically to be reliable because the Seventh Circuit attempts to treat it as having precedential value in a subsequent case. Notwitshtanding, the Seventh Circuit, namely the panel of Ripple, Manion and Wood, however, erred in both decisions by considering the experts' methodologies in a vacuum and by permitting the jury to assess the suspicious matters rather than allowing the District Court to discharge its duties as "gatekeeper" as it is obligated to do under *Daubert.* Furthermore, the Seventh Circuit's statement that the credibility of the underlying history can properly be tested through cross-examination and jury evaluation, which was reiterated by the Seventh Circuit in the case at bar, further indicates the Seventh Circuit's willful refusal to apply *Daubert*. In *Daubert*, the U.S. Supreme Court specifically stated that cross-examination and instructions to the jury constitute appropriate safeguards only where *the basis of the scientific testimony meets the standards of Rule 702.* 509 U.S. at 596. Moreover, the Supreme Court stated that one of the objectives for instituting a gatekeeper of evidence was to prevent a "free-for-all" that would confound befuddled juries with pseudoscientific assertions. *Id.* at 595. In both *Cooper* and *Walker*, it was underlying history that was the basis of the "scientific testimony" which the District

Court found unreliable. Therefore, the scientific testimony was itself inadmissible under Rule 702 and *Daubert*. Cross-examination and evaluation of an unreliable basis for expert testimony is not an appropriate safeguard. The Seventh Circuit's proffered recommendation is clearly premised on a pre-*Daubert* approach to the admission of expert testimony.

An expert's use of generally accepted methodology cannot vindicate a conclusion for which there is no underlying scientific basis. *Black v. Food Lion, Inc.*, 171 F.3d 308, 314 (5th Cir. 1999). Where an expert's testimony is based upon erroneous assumptions or inaccurate information it may be properly excluded. *Dukes v. Illinois Central Railroad Co.*, 934 F. Supp. 939, 951 (N.D. Ill. 1996) (court barred expert testimony as unreliable in part because his conclusions were based on history provided by plaintiff and expert testified that the reliability would be affected if history was not accurate); *Barrett v. International Armaments, Inc.*, 1999 WL 199253 (N.D. Ill. 1999) (expert testimony was barred where it was premised on false assumption that safety on gun was disengaged).

In the instant matter, Dr. Pliskin's testimony was fatally flawed under the *Daubert* standard. Dr. Pliskin intended to offer opinions comparing Walker's purported pre-injury IQ with his current IQ. Dr. Pliskin's opinions were based on his analysis of the results of neuropsychological tests given to Walker considered in conjunction with Walker's mental and educational history. First and foremost, all of the tests utilized to establish Walker's pre-injury *and* post-injury IQ were performed over five years after the accident on December 10, 1996 and December 12, 1996. (App. 23) Dr. Pliskin had never examined Walker prior to October 25, 1991 when the alleged injury occurred. (App. 23) In essence, Dr. Plis-

kin claimed to be able to establish *both* pre-injury *and* post-injury IQ by testing the same individual's mental faculties on the same date several years after the alleged injury. Logically, this does not seem plausible.

Moreover, Soo Line established prior to trial that Walker had provided an inaccurate mental and educational history to Dr. Pliskin. Even Dr. Pliskin admitted that these histories were factors considered by him in his evaluation of Walker's pre-injury IQ. The inaccuracies contained in Walker's account of his history were not minor, but rather they were substantial and established by unimpeachable exhibits. With regard to his educational background, Walker claimed that he attended college for two years when in reality, his transcripts indicated that he had completed only one semester. (App. 24) He further claimed that he had an A average while his transcripts indicated that he actually had a failing average. (App. 24) Walker had failed five classes and received a D in two others. (App. 24) The only classes in which he received a grade of A were band and applied tuba. (App. 24) Moreover, his academic records belied his claim that he was a good student in high school. (App. 24) Walker's high school transcript indicated that he was in the lowest quarter of his class. Walker's true educational history was markedly different than that provided to and relied upon by Dr. Pliskin.

With regard to his mental history, Dr. Pliskin relied upon Walker's statement that "he had seen a psychiatrist about 25 years ago for personal reasons." Actually, Walker was treated periodically at a state psychiatric hospital over a six-year period. In 1973, Walker spent eight weeks as a patient at the psychiatric hospital where he was diagnosed with schizophrenia. He was readmitted in 1978 and again treated for schizophrenia.

On these occasions and during out-patient care, Walker was treated with various psychotropic drugs which were shown to be capable of altering one's mind.

Walker's self-proclaimed mental and educational history were primary factors relied upon by Dr. Pliskin for his evaluation and opinions regarding Walker's pre-injury IQ and clearly the information relied upon and forming the basis for his opinions was false. Dr. Pliskin stated that any significant deviation from the mental and educational history provided to him by Walker would impact his analysis and, in turn, his opinions. (App. 24, 27) Furthermore, Dr. Pliskin admitted in his deposition that his methodology of employing neuropsychological tests to evaluate the effect of electric energy on a person's IQ has not been subject to substantial testing or peer review. Despite Dr. Pliskin's own acknowledgments regarding the detrimental effect of an inaccurate history on his opinion and the lack of credible review of his particular method of testing pre-injury IQ, the Seventh Circuit overlooked these flaws and chose instead to focus upon the propriety of the general methodology used by Dr. Pliskin, namely his reliance on patient histories as a basis for his opinions. Although it may be proper for experts to rely on histories provided to them as the basis for their opinions, it is preposterous to infer that *Daubert* permits an application of this premise whereby experts are allowed to rely on *false* histories as long as their methodology is technically appropriate. If the underlying bases of an opinion are erroneous and unreliable, it certainly follows that the opinion, itself, is equally flawed and unreliable.

The District Court reasonably found that the bases of Dr. Pliskin's opinions were seriously flawed and tainted by unreliability. Demonstrating its careful consideration

and weighing of the evidence, the District Court excluded only Dr. Pliskin's opinions regarding pre-injury IQ. The District Court did not bar Dr. Pliskin's testimony in its entirety but rather admitted his testimony regarding Walker's current IQ. Because the basis for Dr. Pliskin's testimony regarding pre-injury IQ was unreliable, the District Court found, in accordance with *Daubert*, that Dr. Pliskin's opinions would not assist the jury. In *Daubert*, the Court suggested that courts consider the known or potential rate of error in assessing scientific reliability. 509 U.S. at 594. Clearly, where the data relied upon is incorrect, the potential rate of error for the opinions drawn therefrom is extremely high. Moreover, the utter lack of similar tests in the field hinders the ability to assess error rates. The Seventh Circuit, however, chose to ignore the findings of the Supreme Court in *Daubert* regarding these hallmarks of unreliability and instead erroneously concluded that a jury should be allowed to hear unreliable testimony assuming that the effect of admission of nonscientific and irrelevant testimony can be countered by instructions to the jury to weigh the reliability of that evidence. The Seventh Circuit's erroneous decision strips *Daubert* of the stringent guidelines that it places on the admission of expert testimony.

Most importantly, Dr. Pliskin's testimony could never have assisted the trier of fact because he admittedly could not even offer an opinion on the issue of causation. (App. 25) Dr. Pliskin's testimony was offered to demonstrate that Walker experienced a decline in functioning *as a result of this injury*. In his deposition, Dr. Pliskin testified that "no one has yet proven scientifically that an electrical shock leads to lower IQ scores." Moreover he stated that he does not have an opinion as to whether the results of the test administered to Walker through his electrical trauma unit are

directly related to the injury which was alleged in his complaint. (App. 25) The Seventh Circuit, however, again found a way to avoid the U.S. Supreme Court's mandate and suddenly held that an expert need not have an opinion on an ultimate question in order to testify. *Walker,* 208 F.3d at 587. (App. 7-8)

Daubert requires that testimony "assist the trier of fact to understand the evidence or determine a fact in issue." *Id.* at 591, 113 S.Ct. at 2795. "Expert testimony which does not relate to any issue in the case is not relevant and ergo, non-helpful." *Id.* For testimony to be helpful, it must have a valid scientific connection to the pertinent inquiry to be admissible. *Id.* at 592. Dr. Pliskin's testimony initially was offered expressly for the purpose of providing an opinion on the ultimate question of whether the alleged injury caused a decline in Walker's mental functioning. In his deposition, however, Dr. Pliskin admitted that he could not say whether Walker's injuries were directly related or caused by the accident at issue. Thus, Dr. Pliskin's testimony clearly is not helpful as it is not scientifically connected to the pertinent inquiry for which Walker proffered Dr. Pliskin's testimony. Because Dr. Pliskin's testimony cannot assist the trier of fact, it was properly excluded.

In rendering its decision to admit or exclude testimony, the trial court is granted broad latitude in deciding how to test an expert's reliability. *Kumho Tire Co.,* 526 U.S. at 142. The Court should consider the specific factors in *Daubert* where they are reasonable measures of reliability of an expert's testimony. *Id.* A reviewing court should not reverse the trial court's evidentiary ruling relating to the admissibility of expert opinion testimony absent a finding that the trial court abused its discretion. *Joiner*, 522 U.S. at 142; *see also, Kumho Tire Co.*, 526 U.S. at 152. The District Court

properly and carefully discharged its gatekeeping duties by excluding the testimony of Dr. Pliskin regarding pre-injury IQ which was tainted by unreliability. It was unquestionably reasonable for the District Court to find that Dr. Pliskin's opinions regarding pre-injury IQ were unreliable where he relied upon a falsified history as the basis for his opinion and it was unquestionably reasonable for the District Court to find that Dr. Pliskin's testimony would not assist the jury because he could not offer an opinion on the issue for which his testimony was proffered. It was unreasonable, however, for the Seventh Circuit to reverse the District Court's decision to exclude Dr. Pliskin's testimony regarding pre-injury IQ despite its claim that it was applying the principles of *Daubert* and reviewing the decision under the abuse of discretion standard. If this matter is remanded and the order of the Seventh Circuit stands, it will require a District Court to allow the jury to hear and consider the admittedly irrelevant testimony of an expert. The Seventh Circuit's decision demonstrates its willful refusal to abide by the directives of *Daubert*, *supra*, *Kumho Tire*, *supra*, and *General Electric*, *supra*.

2. Under The *Daubert* Standard, The Testimony Of Dr. Capelli-Schellpfeffer Should Have Been Excluded Because Her Testimony Was Inherently Unreliable.

The Seventh Circuit found that the District Court had erred in excluding the testimony of Dr. Capelli-Schellpfeffer, finding that: (1) she was qualified to testify; (2) she relied upon a proper methodology; and (3) her testimony was reliable. *Walker*, 208 F.3d at 588-89. (App. 9-12) The Seventh Circuit's decision was premised upon flawed reasoning and inapposite case law.

In reviewing this aspect of the District Court's decision, the Seventh Circuit again focused upon the methodology used by Dr. Capelli-Schellpfeffer in order to assess the reliability of her expert testimony. *See id.* The Seventh Circuit relied upon the premise that it is appropriate for medical professionals to rely upon the opinions, observations and tests of other medical professionals in their field. *Id.* at 588. The cases relied upon by the Seventh Circuit were decided prior to *Daubert* and do not even utilize a comparable standard. *See e.g. Birdsell v. United States*, 346 F.2d 775 (5th Cir. 1965); *Durflinger v. Artiles*, 727 F.2d 888 (10th Cir. 1984). Moreover, *Daubert* specifically provides that the relaxation of the requirement that an expert base his/her opinions on first hand knowledge is "premised on the assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline." *Id.* at 592.

After the Supreme Court's decision in *Daubert*, the standard governing the admission of expert testimony is certainly more stringent. Post-*Daubert*, experts are expected to have a wider basis for their decisions than mere subjective analysis of other expert opinions. *Stasior v. Nat. Railroad Passenger Corp.*, 19 F. Supp. 2d 835 (N.D. Ill. 1998) (expert's opinion unreliable where he lacked training, failed to cite scientific studies, conduct tests, or collect and compare data). The Seventh Circuit seemed to suggest that Dr. Capelli-Schellpfeffer's role as leader of a clinical team magically instilled within her the knowledge, training and expertise of the individual members of her clinical team. *See Walker*, 208 F.3d at 589. (App. 12) This is a gross misconception which is illustrated by Dr. Capelli-Schellpfeffer's own testimony. Throughout her deposition, she repeatedly deferred to the findings and opinions of Dr. Pliskin to whom she had referred Walker. (App. 36-37)

Her inability to state her own opinions or rely on her own analysis highlights her deficient qualifications and lack of expertise. As such, the District Court correctly recognized the questionable and unreliable nature of her testimony and properly excluded her.

Moreover, the Seventh Circuit has reviewed Dr. Capelli-Schellpfeffer's methodology in a vacuum rather than evaluating its effect in practice. In fact, the method used by Dr. Capelli-Schellpfeffer resulted in her using the flawed analysis and evaluation of Dr. Pliskin as the basis of her opinions which makes her testimony as equally unreliable as Pliskin's opinions. In her deposition, Dr. Capelli-Schellpfeffer testified that in evaluating patients to determine the effect of electrical exposure she needs personal and event history as well as information regarding their mental functioning both before and after the accident to determine if there has been a decline. (App. 37) Dr. Capelli-Schellpfeffer only met with Walker twice before referring him to other physicians in her clinical group including Dr. Pliskin. She then reviewed and relied upon Dr. Pliskin's analysis regarding Walker's pre-injury IQ to determine whether there was a decline in his mental functioning. As previously discussed *supra*, Dr. Pliskin considered false information as a substantial factor on which he based his conclusions and as such his opinions regarding Walker's mental functioning are inherently flawed and unreliable. In turn, Dr. Capelli-Schellpfeffer's opinions are equally unreliable since they are based upon Dr. Pliskin's conclusions regarding Walker's mental functioning rather than Dr. Capelli-Schellpfeffer's independent analysis. (App. 32) It is irrelevant that Dr. Capelli-Schellpfeffer may have utilized a technically proper methodology because it is the information she gained through this method and which she relied upon as the basis for her opinion that is substantially

flawed and unreliable. In accordance with *Daubert*, Dr. Capelli-Schellpfeffer's testimony was properly excluded since she is relying on second-hand knowledge and information which was shown to be unreliable.

Furthermore, it was reasonable for the District Court to find that Dr. Capelli-Schellpfeffer's testimony was unreliable because while she is not a psychiatrist or psychologist she formulated opinions regarding post-traumatic stress disorder, a psychological condition on which she is not qualified to render opinions. (App. 33-35, 40) The district court should be skeptical about offered testimony of a witness outside his or her normal area of practice. *Jones v. Royalton Food Service Equipment Co.*, 1998 WL 792184 at *6 (N.D. Ind. 1998). Dr. Pliskin, a psychologist, found that Walker did not suffer from post-traumatic stress disorder. (App. 25) Despite having relied upon Dr. Pliskin's observations, analysis and opinions and lacking requisite training or expertise in the relevant field, Dr. Capelli-Schellpfeffer reached the contrary conclusion that Walker *did* suffer from post-traumatic stress disorder. (App. 33-35, 40) Rather than recognizing this as an indication of unreliability, the Seventh Circuit rationalized it by relying upon an inapposite case. According to the Seventh Circuit, "[t]hat two different experts reach opposing conclusions from the same information does not render their opinions inadmissible." *Walker*, 208 F.3d at 589 (*quoting Allapattah Services, Inc. v. Exxon Corp.*, 61 F. Supp. at 1341). (App. 11) The Seventh Circuit, however, failed to recognize the glaring distinction between *Allapattah Services* and the case at bar. In *Allapattah*, the Court was faced with "dueling experts" for *opposite parties*. *Id.* at 1341. Clearly, an expert for one party is expected to contradict or oppose the opinions and conclusions of the other party's expert. In the case at bar, given the fact that the experts were both retained by Walker, their testimony should have been consistent. Because Pliskin

and Dr. Capelli-Schellpfeffer offer contradictory opinions based on the same underlying information and they were retained by the same party, it casts a grave shadow of doubt on the reliability of the opinions of both experts. In addition, the conflicting testimony is ineffectual to the trier of fact. The shadow of unreliability is even greater where the expert is opining outside of her area of practice. Dr. Capelli-Schellpfeffer's second-hand reliance on the findings and conclusions of Dr. Pliskin as the basis for her opinions does not meet with the standards of *Daubert* as she cannot fulfill the requisite assumption that her opinions have a reliable basis in the knowledge and experience of her discipline. As such, Dr. Capelli-Schellpfeffer's opinion that Walker suffered from post-traumatic stress disorder was properly excluded by the District Court from the jury.

The District Court properly discharged its gatekeeping duties by excluding the testimony of Dr. Capelli-Schellpfeffer. It was unquestionably reasonable for the District Court to find her opinions unreliable where she relied upon conclusions of another expert which were based on false data and whose testimony was inadmissible. It was unquestionably reasonable for the District Court to find her opinions regarding post-traumatic stress disorder to be unreliable where she was not a psychiatrist or psychologist and where her opinion on this subject contradicted the opinion of another expert who was retained to testify for Walker and upon whose opinions she relied as a basis for her opinion. It was unreasonable for the Seventh Circuit to reverse the District Court's decision despite its claim that it was applying the factors of *Daubert* as well as reviewing the lower court's decision under an abuse of discretion standard. The Seventh Circuit's decision demonstrates its willful refusal to abide by the directives of *Daubert, supra*.

3. Under The *Daubert* Standard, The Testimony Of Dr. Uman Should Have Been Excluded Because His Opinions Relating To Causation Were Unreliable.

The Seventh Circuit found that the District Court erred in excluding the testimony of Dr. Uman finding that: (1) Uman should have been permitted to offer alternative scenarios as to how lightning could have penetrated the tower; and (2) that the alternative scenarios would have assisted the jury. *Walker*, 208 F.3d at 589-90. (App. 12-14) Although Walker claimed and the Seventh Circuit found error based on the District Court's decision to exclude the testimony of Dr. Uman, this alleged error was clearly harmless since ultimately, the District Court found that counsel for Soo Line had opened the door to Dr. Uman's testimony. Dr. Uman was permitted to testify regarding his opinions as to how lightning had entered the tower. The ultimate admission of Dr. Uman's testimony illustrates the absurdity of the Seventh Circuit's opinion in which it found that the District Court's rulings did not constitute harmless error. (App. 17) Regardless, Soo Line asserts that the District Court's initial decision to exclude Dr. Uman's testimony was reasonable and proper.

Dr. Uman was retained by Walker to hypothesize regarding possible scenarios whereby an electrical shock could have reached him within the tower in which he was working thereby causing injury. Dr. Uman concluded that there were three possible scenarios as to how the alleged accident could have occurred. (App. 49, 52) Dr. Uman's opinions, however, amount to no more than speculation, guess and conjecture which cannot satisfy the stringent standards of reliability mandated by *Daubert*.

Initially, Dr. Uman relied upon the opinion of another expert retained by Walker who stated that there was a fifty-percent (50%) chance that lightning struck, at the time of the alleged accident, within a five mile radius of the tower in which Walker was working. Accordingly, this conclusion concedes that there was a fifty-percent (50%) chance that lightning did not strike within the five mile area during that time. Therefore, the underlying basis of Dr. Uman's subsequent opinions and theories is an unsubstantiated assumption that lightning actually struck. Moreover, Dr. Uman surmises that if lightning did strike, there were three alternative means by which it could have injured Walker. It might have directly hit the tower in which Walker was working or it might have struck a nearby tower. Additionally, it might have struck the rail in the yard that was connected to the switch which Walker was touching at the time of the strike. Dr. Uman admitted, however, that if it struck another rail in the yard that was not connected to that switch it would not have injured Walker. Dr. Uman offered no scientific basis for his belief that the injury could have occurred in one of these three manners. He was not able to substantiate any of these theories through physical evidence nor was he able to rule other alternatives out. In addition, he was not able to rule out the possibility that lightning did not strike at all. Each scenario constitutes nothing more than speculation based wholly on an assumption that lightning actually struck within the area at a given time.

The Seventh Circuit's decision to admit the testimony of Dr. Uman ignores the breadth of decisions in which the court has excluded expert opinions on the issue of causation because the expert failed to reject other possible theories. *See Bauer v. J.B. Hunt Transport,* 150 F.3d 759, 765 (7th Cir. 1998) (expert testimony as to factors that could contribute to collision excluded be-

cause court found that jury could have only speculated as to causal connection between factors identified and events at issue in case); *Driggs v. Sofamor*, 44 F. Supp. 2d 760, 765 (M.D.N.C. 1998) (no competent evidence of causation where expert failed to rule out other causes); *Zarecki v. National Railroad Passenger Corp.*, 914 F. Supp. 1566, 1573 (N.D. Ill. 1996) (expert must rule out subjective belief or unsupported speculation); *Menges v. Depu Motech, Inc.*, 61 F. Supp. 2d 817, 825 (N.D. Ind. 1999) (expert's testimony failed to meet standards set forth by *Daubert* where he did not consider and reject any other viable causes for plaintiff's problem); *Lawson v. Smith*, 1999 WL 1129677 at *4 (N.D. Ga. 1999) (expert failed to eliminate other possible causes of condition such that he could properly testify on causation). Moreover, courts applying the *Daubert* standard have consistently held that experts cannot speculate when offering opinions. *DePaepe v. GM Corp.*, 141 F.3d 715, 720 (7th Cir. 1998); *see also Barrett*, 1999 WL 199253 (N.D. Ill. 1999) (expert testimony must be grounded on scientific knowledge and not based on speculation). "[T]he courtroom is not the place for scientific guesswork, even of the inspired sort. Law lags science; it does not lead it." *Rosen v. CIBA-Geigy Corp.*, 78 F.3d 316, 319 (7th Cir. 1996).

Instead of following precedent, the Seventh Circuit chose instead to rely upon two inapposite cases to support its finding that Uman should have been permitted to testify to alternative causation theories. (App. 13) Both cases, however, related to alternative damage calculation models. *Cole v. Control Data Corp.*, 947 F.2d 313, 319 (8th Cir. 1991); *John Morrell & Co. v. Local Union 304A*, 913 F.2d 544, 558-59 (8th Cir. 1990). In *Cole*, the court noted the critical distinction between alternative causation theories and damage models, finding that *the existence*, and not the amount of damages,

must be proven with reasonable certainty. In these cases, the issues raised by the expert's opinion pertained to calculations that quantify the plaintiff's damages yet all of the proposed alternatives resulted in the award of damages to the plaintiff. In the case at bar, the very premise of Walker's claim, whether an injury could have occurred or in essence whether damages actually exist, is uncertain depending upon which of the alternatives proposed by Uman the jury believes. Unlike the cases relied upon by the Seventh Circuit, those cases relating to expert theories of causation indicate that expert testimony will not be reliable *unless* other possibilities are eliminated. Therefore, testimony relating to alternative theories for damages and causation are treated quite differently despite the Seventh Circuit's failure to recognize this distinction.

The District Court properly discharged its gatekeeping duties by excluding the testimony of Dr. Uman. It was unquestionably reasonable for the District Court to find that Dr. Uman's testimony was unreliable as he could only speculate regarding three alternative theories for how lightning might have entered the tower, if at all. Dr. Uman's opinions constitute speculation built on speculation. To deem these opinions scientifically reliable or to consider these theories as scientific methodology opens the floodgates to the admission of junk science in the courtroom thereby defeating the objectives of *Daubert*. It was unreasonable for the Seventh Circuit to reverse the District Court's decision to exclude Uman's testimony despite its claim that it was applying the abuse of discretion standard. The Seventh Circuit's decision demonstrates its willful refusal to abide by the directives of *Daubert, supra*.

CONCLUSION

The Seventh Circuit's review of the District Court's rulings regarding the exclusion of expert testimony establishes a clear conflict between the directives of the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals* and the Seventh Circuit's application of these principles and objectives. The Seventh Circuit has not only undermined the policies of *Daubert* regarding expert testimony but also through its review of the District Court rulings it has warped the abuse of discretion standard set forth in *General Electric v. Joiner* and *Kumho Tire v. Carmichael*. *Daubert* sought to resolve issues of reliability and relevance with regard to expert testimony. In doing so, *Daubert* further established who is responsible for evaluating expert testimony to determine whether it bears the hallmarks of reliability rather than simply presenting misleading and confusing evidence to the jury for its consideration. It is evident from the decision on appeal that the Seventh Circuit does not agree with the Supreme Court's decision in *Daubert* as to both determinations of reliability and to whom such responsibility has been granted. Their disagreement with the Supreme Court's directives, however, is irrelevant since lower courts must comply with Supreme Court decisions to create uniformity. The Seventh Circuit has usurped the District Court's role as gatekeeper which it had discharged in a well-reasoned manner given the nature of the expert testimony presented. Rather than executing its review in accordance with the abuse of discretion standard, the Seventh Circuit reconsidered the evidence and reversed the District Court's rulings based on its disagreement with the District Court's findings and in the absence of striking error.

The Soo Line Railroad respectfully requests that this Court review its Petition in order to resolve the fundamental incompatibility of the Seventh Circuit's opinions with the decisions issued by this Court in *Daubert*, *General Electric v. Joiner* and *Kumho Tire*. By doing so, this Court can further clarify *Daubert* and align the Seventh Circuit thereby preventing any further distortion of the principles, objectives and directives regarding the admissibility of expert testimony.

Respectfully submitted,

MICHAEL P. CONNELLY
Counsel of Record
THOMAS F. TOBIN
MATTHEW P. CONNELLY
CONNELLY ROBERTS & McGIVNEY LLC
One North Franklin Street
Suite 1200
Chicago, Illinois 60606
(312) 251-9600

Attorneys for Petitioner